

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 20, 2008

STATE OF TENNESSEE v. DONALD E. O'NEAL, JR.

**Direct Appeal from the Circuit Court for Montgomery County
No. 40600422 Michael R. Jones, II, Judge**

No. M2008-00146-CCA-R3-CD - Filed September 15, 2009

The defendant, Donald E. O'Neal, was convicted of attempted especially aggravated robbery, a Class B felony; delivery of a Schedule II drug, a Class C felony; and reckless homicide, a Class D felony. He was sentenced to twelve years for the Class B felony, six years for the Class C felony, and four years for the Class D felony, with all sentences to run consecutively for a total effective sentence of twenty-two years. On appeal, he argues that the evidence was insufficient to support his Class C felony conviction and that he was sentenced improperly. After careful review, we conclude that the evidence was sufficient to support the defendant's conviction for delivery of a Schedule II drug and the imposition of consecutive sentences. With regard to sentencing, it was within the trial court's discretion to apply the sentencing enhancement factor that the victim was particularly vulnerable and that the defendant employed a firearm in the commission of the crimes. However the trial court misapplied two other enhancement factors. Therefore, we remand this case to the trial court for resentencing in compliance with sentencing procedures.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part
and Remanded for Resentencing**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Debra A. Wall, Clarksville, Tennessee, for the appellant, Donald E. O'Neal, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; John Wesley Carney, Jr., District Attorney General; and Chris Clark and Steve Garrett, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This case involves the shooting death of Billy Lalliberte, the victim, following a drug transaction with the defendant and a co-defendant, Derek Dooley on December 23, 2005. The sale of the cocaine and the shooting occurred approximately one hour apart. Both incidents occurred in

the apartment of Sigur Barbee. During the defendant's trial, a number of witnesses testified that they saw the defendant return to the apartment with weapons and that they either saw or heard the defendant hit the victim and demand money from him. The defendant was seen fleeing the scene after shots were fired.

Donna Sebree testified that she lived in the apartment next to the scene of the victim's shooting. She testified that she knew the defendant and that she saw the defendant at the apartment on the day of the shooting. She testified that she saw the defendant on the porch of the apartment where the victim was shot and that she heard gunshots after the defendant entered the apartment. She further testified that she saw the defendant run from the scene.

Walter Quarles testified that he also lived next to the apartment where the victim was shot. He testified that he looked out his window after he heard shots. He said that he identified the defendant from a photo lineup at the police department following the shooting. He testified that he did not know the defendant, but he knew people called him "Dirty." He acknowledged that one of the men had a bandana over his face and that he told the police that day that he could not identify the shooter.

Kenneth Russell testified that he was the nephew of Donna Sebree. He said that he lived in the apartment next door to where the victim was shot. He testified that he knew the defendant. He said that he was sitting on the front porch when the defendant arrived. He said that he heard a commotion from inside the apartment, followed by a couple of gunshots. Several people came out of the apartment, but he did not see the defendant. The witness testified that he ran into his apartment when he heard the gunshots.

Linda Hutchenson testified that she was also a neighbor. She testified that there was a driveway between her apartment and the apartment where the victim was shot. She recalled seeing several people run from the apartment on the day of the shooting. She specifically identified the defendant as one of the men who fled across her yard wearing a bandana across his face. She testified that the defendant had been at the apartment earlier in the day. As she was leaving her apartment around noon that day, she saw the defendant arrive at the apartments.

Sigur Barbee testified that he lived in the apartment where the victim was shot. He testified that the victim asked him for a "forty piece of crack." He testified that a forty of crack was forty dollars worth of crack (cocaine). He said that he stopped the defendant on the day the victim was shot because he knew that the defendant and Dooley could get the drugs for the victim. Both men returned to the apartment about forty-five minutes later. The witness testified that the victim was involved in a "dice game" in the bedroom of the apartment and that the defendant went to that room. He noticed that both men were armed. The witness said that he started to leave the living room and heard a shot. He saw the defendant hit the victim three or four times before the victim was shot.

The witness also testified that he saw the defendant reach into the victim's pockets and pull out money. The defendant told the victim to take off his shoes, but the victim refused. The

defendant “snatched” the victim’s left shoe off. The witness testified that the defendant and Dooley were the only people he saw with guns.

During cross-examination, the witness testified that he bought two “forty’s” of crack for the victim on the day that he was shot. The first “forty” was purchased from a neighbor “down the street,” and the second “forty” was purchased from the defendant and Dooley. He said the defendant did not enter the apartment during the drug transaction. The witness testified that the defendant returned later and asked the victim for money. The witness denied that he was a crack addict but acknowledged that he was a crack smoker. He said that he did not see the defendant shoot the victim.

Danny Ellis testified that he was the cousin of co-defendant Dooley. He said that it was “not a secret” that the apartment where the victim was shot was known for being a “crack house.” The victim told Ellis that the victim had purchased crack from Dooley. He saw both the defendant and Dooley return to the apartment and observed that they were armed with guns. He overheard them hitting the victim and demanding money.

Kathy Sue Settle was also present at the apartment on the day of the shooting. She testified that she saw the victim and Dooley meet privately. She said that Dooley left and returned a short time later with another man, the defendant. Both men were armed. She heard them demand money from the victim, and she fled from the home.

The medical examiner testified that the victim died of two gunshot wounds to the abdomen.

A police officer testified that he recovered ammunition for an AK-47 at Dooley’s home that was consistent with the shell casings found at the scene. He also testified that the victim was holding a dice cube in his right hand.

Rod Crouch, another resident of the area near the crime scene, testified that he found an assault rifle near his home on the day following the crime.

The two shell casings found at the crime scene were matched to the weapon found by the neighbor. A T.B.I. agent testified that gunshot residue was found on Dooley’s clothing.

A detective determined that the defendant’s girlfriend owned a white Pontiac Grand Prix like the one the defendant was seen driving on the day of the shooting. Dooley told police that he sold crack to the victim but left after the transaction.

Analysis

The defendant argues that the evidence was insufficient to support his conviction for delivery of cocaine. Specifically, he asserts that there was no proof from which the jury could infer that he was guilty of the delivery of cocaine. The State argues that the proof established that the defendant

drove Dooley to a well-known crack house and waited for Dooley to make the transaction after he was informed by the resident that they needed crack cocaine. The State submits that this was sufficient proof to support the conviction.

When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient “to support the finding by the trier of fact of guilt beyond a reasonable doubt.” Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. *State v. Brewer*, 932 S.W.2d 1, 18 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *State v. Elkins*, 102 S.W.3d 578, 581 (Tenn. 2003).

The trier of fact, not this court, resolves questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *Id.* In *State v. Grace*, the Tennessee Supreme Court stated that “[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” 493 S.W.2d 474, 476 (Tenn. 1973).

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982); *Grace*, 493 S.W.2d at 476. Although a conviction may be based entirely upon circumstantial evidence, *Duhac v. State*, 505 S.W.2d 237, 241 (Tenn. 1974), in such cases, the facts must be “so clearly interwoven and connected that the finger of guilt is pointed unerringly at the [d]efendant and the [d]efendant alone.” *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991) (citing *State v. Duncan*, 698 S.W.2d 63 (Tenn. 1985)). However, as in the case of direct evidence, the weight to be given circumstantial evidence and “the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury.” *Marable v. State*, 203 Tenn. 440, 313 S.W.2d 451, 457 (Tenn. 1958) (citations omitted).

Tennessee Code Annotated section 39-17-417(a)(2) (2005) provides that it is an offense for a person to knowingly deliver a controlled substance. Crack cocaine is a Schedule II controlled substance. T.C.A. § 39-17-408 (2006). A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to the cause of the result. T.C.A. § 39-11-302(b) (1977). The defendant asserts that the evidence does not establish

that he orchestrated the delivery of cocaine to the victim or that he was even aware of the sale of the cocaine.

Under Tennessee law, a person may be charged with an offense if “he or she is criminally responsible for the perpetration of the offense.” T.C.A. § 39-11-401, Sentencing Comm’n Cmts. A person is criminally responsible for the conduct of another if, “acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]” T.C.A. § 39-11-402(2). Criminal responsibility is not a separate crime; rather, it is “solely a theory by which the State may prove the defendant’s guilt of the alleged offense . . . based upon the conduct of another person.” *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999). Under a theory of criminal responsibility, an individual’s presence and companionship with the perpetrator of a felony before and after the commission of an offense are circumstances from which his or her participation in the crime may be inferred. *See State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). No particular act need be shown, and the defendant need not have taken a physical part in the crime in order to be held criminally responsible. *See id.* To be criminally responsible for the acts of another, the defendant must “‘in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.’” *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). *State v. Johnny M. Burroughs*, 2006 Tenn. Crim. App. LEXIS 223, at **18-19 (Tenn. Crim. App. Mar. 9, 2006).

Viewed in the light most favorable to the State, we conclude that the evidence is sufficient to support the conviction. Although the defendant did not personally complete the hand-to-hand portion of the drug transaction, the record establishes that he acted “with the intent to promote or assist the commission of the offense” based upon his active role in driving Dooley to get the drugs and returning him to the apartment to complete the transaction.

The proof at trial establishes that the apartment where the victim was shot was well known as a “crack house.” The next door neighbor testified that the defendant had been at the apartment prior to the day of the shooting and drug transaction. The resident of the apartment, Mr. Barbee, testified that he stopped the defendant because he knew the defendant and that he told him that he had a person in his apartment who wanted to buy forty dollars worth of crack. Mr. Barbee testified that the defendant and Dooley told him they would be back with the drugs and that they returned approximately forty-five minutes later. Dooley went inside the apartment, and the defendant sat outside in the car and waited for him to return. Dooley acknowledged to the police that he sold drugs to the victim on the date of the shooting. Thus, in spite of the defendant’s argument that Dooley acted alone, sufficient evidence was presented from which a rational trier of fact could have found the defendant guilty of delivery of a Schedule II drug beyond a reasonable doubt. The defendant clearly associated himself with the crime. The defendant stopped when solicited by Mr. Barbee. The defendant and Dooley returned to Mr. Barbee’s residence with drugs to sell, and the defendant waited outside the apartment while Dooley went inside to exchange the drugs for money. The defendant was at all times responsible for driving Dooley around to deliver the drugs. This case is

similar to our recent decision in *State v. James Peebles*, No. M2008-00240-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 58, at *3 (Tenn. Crim. App. Jan. 23, 2009).

Next, the defendant argues that he was sentenced improperly. Specifically, he contends that the trial court misapplied the enhancement factors and that the trial court erred in imposing consecutive sentences. On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. *See* T.C.A. § 40-35-401, Sentencing Comm'n Comments; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a *de novo* review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). However, this presumption “is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999); *see also State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely *de novo* without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991); *see also Carter*, 254 S.W.3d at 344-45.

In conducting a *de novo* review of a sentence, this court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); *see also Carter*, 254 S.W.3d at 343; *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002).

The defendant's conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. *Carter*, 254 S.W.3d at 343. As further explained by our supreme court in *Carter*,

the trial court is free to select any sentence within the applicable range so long as the length of the sentence is “consistent with the purposes and principles of [the Sentencing Act].” [T.C.A.] § 40-35-210(d). Those purposes and principles include “the imposition of a sentence justly deserved in relation to the seriousness of the offense,” [T.C.A.] § 40-35-102(1), a punishment sufficient “to prevent crime and promote respect for the law,” [T.C.A.] § 40-35-102(3), and consideration of a defendant's “potential or lack of potential for . . . rehabilitation,” [T.C.A.] § 40-35-103(5).

Id. (footnote omitted); *see also State v. Eddrick Devon Pewitte*, No. W2008-00747-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 5, at *23 (Tenn. Crim. App. at Jackson Jan. 5, 2009).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court's sentencing decision. *Carter*, 254 S.W.3d at 343. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. *Id.* at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. *Id.* Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. *Id.* at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See id.* at 343; *State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is *de novo*. *Carter*, 254 S.W.3d at 345.

The victim's mother and brother testified during the sentencing hearing. They testified that the victim was employed as a truck driver though he tried to obtain social security disability. They testified that the victim had a difficult time standing from a chair and a hard time getting into the truck that he drove for a living.

The defendant called several witnesses who testified that he was close to his parents and that his parents always supported him. They testified that the defendant had employment available if he were granted probation. The defendant apologized to the victim's family.

The presentence report stated that the defendant was twenty-three years of age and had an "extensive history" of using marijuana. It was estimated that he spent between \$200 and \$300 daily for the drug. He also acknowledged that he had used cocaine. The defendant had a sporadic work history and no verifiable employment between 2001 and 2005. He had pending charges for aggravated robbery, aggravated assault, and possession of cocaine.

The trial court found that the defendant and Dooley sold cocaine to the victim and then returned with masks and guns to rob him. When they returned, the victim was seated on the floor. The trial court found that, seated on the floor, the victim was totally helpless because of his size and his difficulty standing up. The victim was shot twice and left to die on the floor of the apartment.

The trial court sentenced the defendant to the maximum for each of his convictions. The court applied the following enhancement factors: the defendant had a history of criminal convictions; the victim was particularly vulnerable; the personal injuries inflicted on the victim were particularly great; and the defendant employed a firearm in the commission of the offense.

The trial court, considering the principles of sentencing under Tennessee Code Annotated section 40-35-210, applied enhancement factors for each of the defendant's convictions. For the Class B felony conviction, attempted especially aggravated robbery, the trial court enhanced the sentence on the basis that the defendant was convicted of two additional crimes, that the victim was particularly vulnerable and unable to protect himself because of his obesity and position on the floor, that the personal injuries inflicted upon the victim were particularly great, and that the victim's death far exceeded the element of serious bodily injury. For the Class C felony, delivery of a Schedule II drug, the trial court enhanced the defendant's sentence stating that the defendant had a history of criminal convictions on the basis that he was convicted of two additional crimes. For the Class D felony, reckless homicide, the trial court found enhancement factors including: the defendant had a history of criminal convictions because he was convicted of two additional crimes; the victim was particularly vulnerable; and the defendant employed a firearm in the commission of the offense.

The trial court sentenced the defendant to the maximum sentence for all of his convictions: twelve years for the Class B felony, six years for the Class C felony, and four years for the Class D felony. The trial court has lost its presumption of correctness because it applied two enhancement factors inappropriately. The defendant did not have a history of criminal convictions with which to enhance his sentence. The trial court misapplied this enhancement factor by enhancing each sentence with the defendant's simultaneous convictions. These convictions rise out of the same criminal conduct and should not be used to enhance the other counts of the indictment.

The defendant only argues against the application of one enhancement factor on appeal, that "the personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great." T.C.A. § 40-35-114(6). The defendant contends that the trial court erred in applying this factor because serious bodily injury is an element of the crime of attempted especially aggravated robbery. Here, the serious bodily injury inflicted upon the victim was death. Because serious bodily injury is an element of especially aggravated robbery, the trial court erred in applying the particularly great injury enhancement factor under Tennessee Code Annotated section 40-35-114(6). *State v. Nabeeh Jameel Mateen*, No. M2006-02295-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 333, at *35 (Tenn. Crim. App. at Nashville, May 1, 2008).

Given that the victim was morbidly obese and unable to defend himself against two men with guns while he sat on the floor, the trial court was justified in finding that the victim was particularly vulnerable because of physical disability. T. C. A. § 40-35-114(4).

Given that the defendant used a gun during the crimes, the application of the enhancement factor for employing a firearm in the commission of the offense was proper. T.C.A. § 40-35-114(9).

We recognize, therefore, that two enhancement factors were applicable to the defendant. In sentencing the defendant to the maximum for each conviction, however, the trial court misapplied two enhancement factors. Under these circumstances, we choose to remand this case to the trial court for resentencing in compliance with sentencing procedures.

The defendant also argues that the trial court erred in ordering him to serve his sentences consecutively. Generally, it is within the discretion of the trial court to impose consecutive sentences if it finds by a preponderance of the evidence that at least one of following statutory criteria apply:

- (1) [t]he defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
- (2) [t]he defendant is an offender whose record of criminal activity is extensive;
- (3) [t]he defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) [t]he defendant is sentenced for an offense committed while on probation; or
- (7) [t]he defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b).

If the court concludes that the defendant is a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4), it must make two further determinations in addition to applying general sentencing principles. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). First, it must find an extended sentence is necessary to protect the public from further criminal conduct by the

defendant, and, second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). However, such specific factual findings are unnecessary for the other categories of Tennessee Code Annotated section 40-35-115(b). *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

Here, the defendant was sentenced to consecutive sentences because the trial court determined that the defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. The trial court specifically determined that: the crimes committed by the defendant met both of the factors set forth in *Wilkerson*; consecutive sentences were necessary to protect the public; and the consecutive sentences were reasonably related to the severity of the offenses because a person was killed. Our review reflects that it was within the trial court's discretion to impose consecutive sentences.

Conclusion

Based on the foregoing and the record as a whole, we affirm the trial court's judgments that the evidence was sufficient to support the defendant's conviction for delivery of a Schedule II drug and the imposition of consecutive sentences. The trial court properly applied two enhancement factors and misapplied two factors. Therefore, we remand this case to the trial court for resentencing in compliance with sentencing procedures. It is within the trial court's discretion to impose consecutive sentences.

JOHN EVERETT WILLIAMS, JUDGE